In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1206

ZIONS FIRST NATIONAL BANK, EXECUTOR OF THE ESTATE OF MILTON S. WYCOFF, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented by the petition in this federal estate tax case is whether the Commissioner correctly reduced petitioner's claimed marital deduction under Section 2056 of the Internal Revenue Code of 1954 by the full amount of the state inheritance and federal estate taxes which were payable in the absolute discretion of the executor from the marital trust assets.

The pertinent facts are as follows: The will of Milton S. Wycoff created a marital trust for the benefit of his surviving wife, which was to be comprised of assets equal to 50 percent of the value of his adjusted gross estate. The wife was given the income from the marital trust for life, and a testamentary power to appoint corpus and undistributed income (Pet. App. A 10-11). Decedent's will also directed that all death taxes (Pet. App. A 12)—

> shall be paid out of that portion of my estate which is not included in the Marital Trust * * *, unless, in the best business judgment and sole discretion of my executor, such taxes could be more prudently paid from any assets in my estate without respect to what is or is not included in the Marital Trust * * *.

Since the decedent's death on March 3, 1966, the executor has not directed that any death taxes be paid from assets which would otherwise be included in the marital trust (Pet. App. A 12). However, because the executor had complete discretion to pay death taxes out of the marital trust, the Commissioner reduced the claimed marital deduction by the amount of death taxes which could have been paid from the marital trust. The Tax Court upheld the Commissioner's determination and the court of appeals affirmed (one judge dissenting) (Pet. App. A 8-23; Pet. App. B 24-42).

1. Section 2056(a) of the Code allows a deduction from the gross estate equal to the value of any interest in property passing from the decedent to the surviving spouse to the extent such interest is included in determining the value of the gross estate. The deduction cannot exceed 50 percent of the value of the adjusted gross estate. Section 2056(c). In determining the value of the interest in property passing to the surviving spouse for purposes of the marital deduction, Section 2056(b)(4)(A) provides that there shall be taken into account the effect which any death tax has on the net value to the surviving spouse of such interest. Like other aspects of the federal estate tax, the situation must be considered as of the date of death. *Jackson* v. *United States*, 376 U.S. 503, 508; *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 155; Treasury Regulations, Section 20.2056(b)-4.

Here, at the date of death, the executor was empowered to pay all or a portion of the death taxes out of the marital trust assets. For purposes of the federal estate tax, the critical date is the date of death, as of which the executor was fully empowered to pay the taxes out of the marital trust. The decision below therefore correctly held that the value of the property passing to the surviving spouse, for purposes of the marital deduction, must be reduced by the amount of the taxes which could potentially have been paid from the property as of the date of death, even though subsequent events revealed that the executor did not exercise its discretion to reduce the marital trust. *Bookwalter* v. *Lamar*, 323 F.2d 664, 670 (C.A. 8), certiorari denied, 376 U.S. 969.

Petitioner argues (Pet. 5-7) that the decision in this case conflicts with *In re Estate of Penney*, 504 F.2d 37 (C.A. 6). There, the decedent's will contained no direction as to what property was to bear the burden of the death taxes, and the issue was whether under Ohio law property qualifying for the marital deduction and charitable bequests should be charged with a pro rata share of the federal estate tax burden. Under such circumstances, the court held that the marital and charitable transfers did not bear any federal tax burden because they did not generate any estate tax liability.

In this case, however, the decedent specifically granted to the executor the power in its sole discretion to pay any death taxes from the marital trust assets. Nothing in *Penney* suggests that such a broad power would not reduce the value of the interest of the surviving spouse for purposes of the marital deduction. Cf. *United States* v. *Stapf*, 375 U.S. 118.

2. The court of appeals alternatively upheld the Commissioner's determination on another independent statutory ground not challenged by the petition, *i.e.*, that the amount of the marital trust assets which could be used to pay the death taxes did not qualify for the marital deduction because it constituted a terminable interest in property under Section 2056(b)(5) of the Code. Under that provision, a terminable interest consisting of a life estate coupled with a power to appoint the entire corpus or a specific portion of the corpus will not qualify for the marital deduction unless the power of appointment is solely and in all events exercisable by the life tenant.

Here, the surviving spouse was given a life estate in the marital trust assets coupled with a power to appoint the corpus and accumulated income, but her interest could have been partially defeated if the executor had exercised its power to pay death taxes out of such assets. Thus, as of the date of the decedent's death, the surviving spouse did not have the sole power to appoint all of the trust assets, since the executor could have reduced the marital trust for the payment, in whole or in part, of the death taxes. *Starett* v. *Commissioner*, 223 F.2d 163, 166 (C.A. 1); *Allen* v. *United States*, 359 F.2d 151, 154 (C.A. 2), certiorari denied, 385 U.S. 832. Therefore, the value of the interest of the surviving spouse must be reduced by the amount of the death taxes that could have been paid from the marital trust assets. It makes no difference that the taxes were in fact paid from other funds, for it is the existence of the power to invade, and not the likelihood of its exercise, which is the decisive consideration. Cf. *Henslee* v. *Union Planters Bank*, 335 U.S. 595, 599-600.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.